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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 319

[Docket No. APHIS-2009-0084]

RIN 0579-AD56

Importation of Litchi Fruit From Australia

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the regulations in order to allow, under certain conditions, the importation of commercial shipments of litchi fruit from Australia into the continental United States, except Florida. As a condition of entry, the litchi fruit must be treated with irradiation and subject to inspection. If irradiation is applied outside the United States, the fruit must be inspected jointly by inspectors from the Animal and Plant Health Inspection Service and the national plant protection organization (NPPO) of Australia prior to departure and accompanied by a phytosanitary certificate issued by the NPPO of Australia certifying that the fruit received the required irradiation treatment. If irradiation is to be applied upon arrival in the United States, the fruit must be inspected by Australian inspectors prior to departure and accompanied by a phytosanitary certificate issued by the NPPO of Australia. Additionally, the litchi fruit may not be imported into or distributed within the State of Florida, due to the presence of litchi rust mite in Australia. This action allows for the importation of litchi fruit from Australia into the continental United States, except Florida, while continuing to provide protection against the introduction of quarantine pests.

EFFECTIVE DATE: [Insert date 30 days after date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Ms. Dorothy C. Wayson, Regulatory Coordination Specialist, PPQ, APHIS, 4700 River Road Unit 141, Riverdale, MD 20737-1231; (301) 851-2036.

SUPPLEMENTARY INFORMATION:

Background

The regulations in “Subpart--Fruits and Vegetables” (7 CFR 319.56-1 through 319.56-60, referred to below as the regulations) prohibit or restrict the importation of fruits and vegetables into the United States from certain parts of the world to prevent the introduction and dissemination of plant pests.

On December 28, 2011, we published in the Federal Register (76 FR 81401-81404, Docket No. APHIS-2009-0084) a proposal¹ to amend the regulations to allow fresh litchi fruit (Litchi chinensis Sonn.) from Australia to be imported into the continental United States, except Florida. We proposed that, as a condition of entry, the litchi fruit would have to be produced in accordance with a systems approach that includes requirements for monitoring and oversight, irradiation treatment of the fruit, limited distribution, and shipping.

We solicited comments concerning our proposal for 60 days ending February 27, 2012. We received four comments by that date. They were from two students, a representative of a foreign government, and an organization of State plant regulatory officials. The comments are discussed below by topic.

¹ To view the proposed rule and the comments we received, go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2009-0084>.

Pest List

We prepared a pest risk assessment (PRA) and a risk management document for the importation of fresh litchi fruit from Australia. That PRA evaluated the risks associated with the importation of litchi fruit with up to 5 millimeters of stem into the continental United States from Australia. The threshold allowing for a maximum of 5 millimeters of stem on the imported litchi fruit was included in Australia's market access request and therefore established as the allowable limit in the PRA.

One commenter stated that neither the proposed rule nor the PRA provided phytosanitary justification for the inclusion of this 5 millimeter limit. The commenter further stated that, while the 5 millimeter stem length was included in Australia's market access request, it had been intended only as part of a general description of Australia's standard litchi fruit production practices. The commenter asked that the limit be removed in light of the fact that those pests associated with stems and twigs would either be mitigated by the treatments described in the systems approach regardless of stem length or were not listed as following the pathway of importation.

We agree with the commenter and have removed the requirement.

The PRA identified 15 pests of quarantine significance present in Australia that could be introduced into the United States through the importation of litchi fruit, including 3 fruit flies, 7 lepidopteran pests, 2 scales, 2 other insect pests, and 1 mite.

Green scale (Coccus viridis) and passionvine mealybug (Planococcus minor) were included in the proposed rule and PRA as being two of the quarantine pests of litchi subject to mitigation. Subsequent to publication of the proposed rule, we established that Coccus viridis and Planococcus minor no longer meet our definition of a quarantine pest and have added them

to our list² of pests that we no longer regulate. Therefore, we will not be including Coccus viridis and Planococcus minor among the pests to be listed in the additional declaration on the phytosanitary certificate. This change has the effect of addressing one commenter's recommendation that Planococcus minor not be regarded as a pest following the pathway of commercial shipments.

One commenter requested that we intensively monitor litchi fruit from Australia at the port of entry for the litchi hairy mite (Aceria litchii), which is not eliminated by irradiation.

Port of entry inspection is among the required phytosanitary measures that apply to the importation of litchi fruit from Australia. These measures, which also include requirements concerning irradiation, commercial shipments, and limited distribution, have been successfully applied to shipments of litchis imported from Thailand, where the litchi hairy mite is also present. Based on our experience, we are confident in the efficacy of the standard level of inspection in detecting quarantine pests and preventing their entry into the United States.

Proposed Systems Approach

Based on the risk management document, we determined that measures beyond the standard port of arrival inspection are required to mitigate the risks posed by the plant pests associated with the importation of litchi fruit from Australia. We proposed to allow the importation of litchi fruit from Australia into the United States only if they are produced in accordance with a systems approach to mitigate pest risk.

One commenter objected to our use of the term “systems approach.” The commenter stated that since all pests identified as likely to follow the importation pathway are mitigated by the proposed irradiation treatment and because no specific in-field management measures were

² This list can be viewed at http://www.aphis.usda.gov/plant_health/plant_pest_info/frsmp/non-reg-pests.shtml.

stipulated, the combination of measures would not qualify as a systems approach. The commenter asked that we remove all references to the systems approach from the regulation.

We are making no change as a result of this comment. We proposed a number of requirements that shipments of litchi fruit from Australia would have to meet prior to importation. These requirements concerned place of production, treatment with irradiation, certificates of inspection issued by the national plant protection organization (NPPO) of Australia, limited distribution, and limitation to commercial consignments only. For the reasons discussed below, we have decided to remove the requirement relating to place of production. Contrary to the commenter's assertion, the litchi hairy mite is not mitigated by the irradiation treatment and therefore necessitates specific inspection. In addition, the limited distribution requirement is an additional measure beyond the standard port of arrival inspection which is required to mitigate the risks posed by the plant pests associated with litchis from Australia. Furthermore, the proposed measures meet the definition of systems approach as found in International Standards for Phytosanitary Measures (ISPM) No. 5: The integration of different risk management measures, at least two of which act independently, and which cumulatively achieve the appropriate level of protection against regulated pests.

One element of the proposed systems approach was a requirement that the litchi fruit be grown in approved places of production that are registered with and monitored by the NPPO of Australia.

One commenter argued that the monitoring requirement should be removed, as the proposed systems approach did not include any requirements for in-field control measures of the sort that would require NPPO oversight. The commenter stated that the other methods of control listed as part of the proposed systems approach would be sufficient to mitigate risks posed by those pests discussed in the PRA and the risk management document.

We agree with the commenter. Regulatory requirements concerning the monitoring of approved places of production are associated the application of in-field measures needed to address a specific pest risk, which is not the case with the mitigation measures assigned for litchi fruit from Australia as detailed in the PRA. Rather, the framework equivalency workplan required for irradiated fruits and vegetables as described in § 305.9(e)(1)(B) of our phytosanitary treatments regulations, stipulates that the U.S. and the exporting country's NPPO must establish the type and amount of inspection, monitoring, or other activities that will be required in connection with allowing the importation of irradiated fruits and vegetables. Such workplans include requirements for NPPO-approved places of production for the purpose of specific traceability in the event of an unforeseen pest situation. This allows for the Animal and Plant Health Inspection Service (APHIS) and the NPPO to work collaboratively to address the situation in-country without applying unnecessary importation restrictions.

Another element of the proposed systems approach was a requirement that the litchi fruit be imported in commercial consignments only. This is because commercially produced fruit are already subject to standard commercial cultural and post-harvest practices that reduce the risk associated with plant pests. Export orchards that are registered production sites with traceback capability was cited as one of those practices that helps ensure the phytosanitary security of exported litchis.

One commenter requested that we exclude the requirement regarding registered production sites with traceback capability. The commenter argued that such a stipulation is inconsistent with the requirements of previous rules regarding the importation of fruits and vegetables from Australia as well as rules regarding the importation of litchi fruit from countries other than Australia. The commenter concluded that, from a regulatory flexibility standpoint, it would be preferable to include any requirement regarding traceability in the framework

equivalency workplan given that these workplans may be amended more easily to reflect any changing conditions within the country that would necessitate such tracking.

We agree with the commenter's point and have removed references to the requirement that orchards be registered with and monitored by the NPPO of Australia in this final rule. We also agree that any such requirements are more appropriately located in the framework equivalency workplan where, as with the conditions concerning monitoring requirements discussed previously, they would provide for specific traceability in the event of an unforeseen pest situation.

Another element of the proposed systems approach was a requirement that litchi fruit be treated with a minimum absorbed irradiation dose of 400 gray in accordance with the provisions of § 305.9 and the Plant Protection and Quarantine Treatment Manual. This is the established generic dose for all insect pests, except pupae and adults of the order Lepidoptera. While the preamble text in the proposed rule specified that such treatment could be conducted at an approved facility in Australia or in the United States, the proposed regulatory text stated that treatment would have to be conducted prior to importation of the fruits into the United States.

The commenter asked that the requirement for the fruit to be treated prior to importation into the United States be removed.

We agree with the commenter and have changed the requirement accordingly. If irradiation is applied outside the United States, the fruits must be inspected jointly by inspectors from APHIS and the NPPO of Australia prior to departure and accompanied by a phytosanitary certificate issued by the NPPO of Australia certifying that the fruit received the required irradiation treatment. If irradiation is to be applied upon arrival in the United States, the fruits must be inspected by Australian inspectors prior to departure and accompanied by a phytosanitary certificate issued by the NPPO of Australia.

In addition to altering the requirement associated with the location of the irradiation treatment, we are also removing the stipulation that this information be contained in an additional declaration, as an additional declaration is not used for certifying application of a treatment or details of a treatment. Instead, if irradiation is applied outside the United States, the fruits must be inspected jointly by inspectors from APHIS and the NPPO of Australia prior to departure and accompanied by a phytosanitary certificate issued by the NPPO of Australia certifying that the fruit received the required irradiation treatment. We included the requirement concerning the additional declaration regarding treatment information in error in the proposed rule. Certification of irradiation treatment will provide sufficient phytosanitary protection.

Because the litchi hairy mite is not present in Florida and because we have consistently prohibited host movement into Florida from areas where that pest is present, another aspect of the proposed systems approach was to prohibit the importation and distribution of litchi from Australia into the State of Florida by requiring that all cartons of litchi be stamped “Not for distribution in FL.”

One commenter stated that we should also restrict importation of litchi fruit into the State of California given that Florida and California have similar climates that allow for the establishment and survival of the litchi hairy mite. Another commenter stated that commercial litchi production is an emerging field in California and those small- and medium-scale agricultural producers and family farms in particular would be helped by the exclusion of Australian litchi fruit from California.

We are making no change as a result of these comments. Unlike the more humid climate found in Florida, the dry Mediterranean climate in California is not conducive for the survival of the litchi hairy mite. Additionally, the occurrence of seasonal cold snaps and high winds in California causes flower loss and, consequently, poor fruit set. The litchi tree needs a truly

tropical climate to produce much fruit. Further, production levels of litchi in California are low. We therefore believe that the improbability of mite survival and the small number of hosts available in California are sufficient to mitigate the risk posed by litchi hairy mite. Finally, regarding the second commenter's point, APHIS does not have the authority to prohibit commodities for importation solely based on potential economic impact. The determining factor must be scientifically established pest risk.

Pest Risk Analysis

The Asian ambrosia beetle (Euwallacea fornicatus) was listed in the PRA as being a pest of litchi present in Australia that is also present in Hawaii. We determined that Euwallacea fornicatus was not likely to follow the importation pathway and therefore did not address it further via mitigations. One commenter stated that we should remove Euwallacea fornicatus from the list of quarantine pests in the PRA because the pest is also present in Florida and California in addition to Hawaii.

The commenter is correct regarding the distribution of Euwallacea fornicatus within California, Florida, and Hawaii. However, while the beetle is present in California and Florida based on more recent references than those cited in the PRA, it is also currently listed as reportable in a domestic context and is currently being assessed by the United States Department of Agriculture's New Pest Advisory Group. Euwallacea fornicatus, therefore, meets our standards regarding quarantine pests. For that reason, we are making no changes as a result of this comment.

Economic Analysis

We analyzed the potential economic effects of the importation of litchi fruit from Australia on small entities and concluded that any litchi price declines that might result from this rule would be insignificant, especially if, as is likely, at least some litchi fruit imports from

Australia were to displace imports from other countries. Additionally, we stated that, given that the agricultural seasons in the Southern Hemisphere are generally the opposite of those in the Northern Hemisphere, the proposed imports from Australia likely would not directly compete with U.S. litchi fruit production. As a result, we determined that the importation of litchi fruit from Australia would not have a significant economic impact on a substantial number of small entities.

One commenter stated other agencies such as the United Nations Food and Agriculture Organization do not distinguish between fresh and processed fruit, while the U.S. Harmonized Tariff System group litchi fruit with other exotic fruits into a single category. The commenter further stated that the analysis performed by APHIS to determine the economic effects of the proposed rule on small entities uses data from 2004 and earlier in order to reach its conclusions. The commenter concluded that it is important to base any economic analysis on current data that is segregated specifically by fruit type in order to best inform the decisionmaking process.

We are making no changes as a result of this comment. The commenter rightly observes that the United Nations Food and Agriculture Organization and the U.S. Harmonized Tariff System do not separate shipment data concerning fresh litchis in particular, however we did not use data from either of these sources in order to conduct our economic analysis. The most recent sources of information specifically regarding fresh litchis are from the Proceedings of the Florida State Horticultural Society, 118³, and a paper entitled “Is It Still Profitable to Grow Lychee in Florida?,” which was released by the Food and Resource Economics Department, Florida Cooperative Extension Service, Institute of Food and Agricultural Sciences, University of Florida, and may be found on the Internet at <http://edis.ifas.ufl.edu/fe496>. These papers are

³ Copies of the proceedings are available from the person listed under FOR FURTHER INFORMATION CONTACT.

dated 2005 and 2004, respectively. They represent the most recent, targeted economic information available on the subject of the importation of litchi fruit and the domestic market.

The commenter also said that the two main factors that affect the profitability of litchi farmers in the United States are product yield and market price. The commenter referenced an analysis conducted by the University of Florida, Department of Food and Resource Economics, which concluded that net returns are very sensitive to even small market price fluctuations, even more than a similar increase or decrease in yield.

We are making no changes as a result of this comment. The quantity of litchi fruit that Australia proposes to export to the United States (400 metric tons) represents 2.7 percent of total U.S. imports. This relatively small quantity is unlikely to cause market fluctuations.

The commenter agreed that the importation of litchi fruit from Australia alone is not likely to have a major effect on the price of litchi sold in the United States due to the small quantity and the differing harvest periods in the Northern and Southern Hemispheres. However, the commenter also stated that litchi fruit imported from Australia, when considered in conjunction with litchi fruit imported from countries such as Thailand, Vietnam, and South Africa, may contribute to the declining price of litchi fruit overall. The commenter stated that APHIS should take into account projected import levels of litchi fruit from all countries, rather than considering such importations on country-by-country basis.

We are making no changes as a result of this comment. APHIS evaluates commodity import requests on a case-by-case basis. Accordingly, the economic analysis considers total imports levels from those countries that currently export to the United States in conjunction with the projected level of imports from the requesting country. Prior to the publication of this rule, we allowed for the importation of litchi fruit from China, India, Taiwan, and Thailand, and therefore based our assessment of the potential economic impact of the rule on imports from

those countries. In the event that other countries, such as Vietnam or South Africa, submit requests for market access for litchi fruit, we will evaluate the economic impacts of imports from those countries. We do not consider the potential economic impact of exports of commodities from countries that have not submitted market access requests to us.

Therefore, for the reasons given in the proposed rule and in this document, we are adopting the proposed rule as a final rule, with the changes discussed in this document.

Executive Order 12866 and Regulatory Flexibility Act

This final rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

In accordance with the Regulatory Flexibility Act, we have analyzed the potential economic effects of this action on small entities. The analysis is summarized below. Copies of the full analysis are available on the Regulations.gov Web site (see footnote 1 in this document for a link to Regulations.gov) or by contacting the person listed under FOR FURTHER INFORMATION CONTACT.

World production of litchi is estimated to be 2.2 million metric tons (MT), with China accounting for over 50 percent (1.2 million MT), and one-third produced by India (0.7 million MT). The United States produces approximately 500 MT per year, which represents less than 0.03 percent of world production. U.S. litchi production is concentrated in the States of Florida, Hawaii, and California. Florida has the largest area under production (1,200 acres), followed by Hawaii (300 acres) and California (60 acres). Currently, Australia produces 3,500 MT of litchis. Australia expects to export approximately 20 forty-foot containers of litchis per year to the United States, which is equivalent to about 400 MT.

In 2004, the United States imported a total of 14,854 MT of litchis, mainly from China, Taiwan, and Mexico. Australia's proposed export quantity represents about 2.7 percent of U.S. imports in 2004.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12988

This final rule allows litchi fruit to be imported into the continental United States from Australia. State and local laws and regulations regarding litchi fruit imported under this rule will be preempted while the fruit is in foreign commerce. Fresh fruits and vegetables are generally imported for immediate distribution and sale to the consuming public, and remain in foreign commerce until sold to the ultimate consumer. The question of when foreign commerce ceases in other cases must be addressed on a case-by-case basis. No retroactive effect will be given to this rule, and this rule will not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), the information collection or recordkeeping requirements included in this final rule, which were filed under 0579-0386, have been submitted for approval to the Office of Management and Budget (OMB). When OMB notifies us of its decision, if approval is denied, we will publish a document in the Federal Register providing notice of what action we plan to take.

E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the Internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851-2908.

List of Subjects in 7 CFR Part 319

Coffee, Cotton, Fruits, Imports, Logs, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

Accordingly, we are amending 7 CFR part 319 as follows:

PART 319--FOREIGN QUARANTINE NOTICES

1. The authority citation for part 319 continues to read as follows:

Authority: 7 U.S.C. 450 and 7701-7772, and 7781-7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

2. A new § 319.56-61 is added to read as follows:

§ 319.56-61 Litchi from Australia.

Litchi (Litchi chinensis) may be imported into the continental United States from Australia only under the following conditions and in accordance with all other applicable provisions of this subpart:

(a) The litchi must be treated for plant pests of the class Insecta, except pupae and adults of the order Lepidoptera, with irradiation in accordance with § 305.9 of this chapter. Treatment may be conducted either prior to or upon arrival of the fruits into the United States.

(b) Each shipment of litchi must be accompanied by a phytosanitary certificate of inspection issued by the NPPO of Australia. For those shipments of litchi treated in Australia, the phytosanitary certificate must certify that the fruit received the required irradiation treatment prior to shipment. For those shipments of litchi treated upon arrival in the United States, the fruits must be inspected by Australian inspectors prior to departure and accompanied by a phytosanitary certificate.

(c) In addition to meeting the labeling requirements in part 305 of this chapter, cartons in which litchi are packed must be stamped “Not for importation into or distribution in FL.”

(d) The litchi may be imported in commercial consignments only.

(Approved by the Office of Management and Budget under control number 0579-0386)

Done in Washington, DC, this 17th day of September 2013.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

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